

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ZEKE WILSON,)	
WILSON PROMOTIONAL GROUP, INC.,)	
Plaintiffs,)	
)	CIVIL ACTION
v.)	NO. 98-12299-WGY
)	
WILBERT J. McCLURE,)	
WILLIAM PENDER,)	
Defendants.))	

MEMORANDUM

YOUNG, C.J.

September 21, 2001

Following the successful prosecution of a civil rights claim and the award of attorneys' fees to all counsel for the prevailing parties, Wilson v. McClure, 135 F. Supp. 2d 66 (D. Mass. 2001), this case settled and Attorney Marc S. Alpert and Marc S. Alpert, P.C. ("Alpert") filed an attorneys' lien in response to this Court's paltry fee award. Counsel for the plaintiffs promptly filed a motion to have this Court determine the amount of the attorneys' lien, evidently believing that Alpert's attorneys' lien should be limited or capped in relation to this Court's award of attorneys' fees pursuant to 42 U.S.C. § 1988. On September 20, 2001 this Court denied that motion and instead referred the matter to the Massachusetts Bar Association fee arbitration board pursuant to the written contingent fee

agreement between Alpert and the plaintiffs.

I. Analysis

The applicable statute is Massachusetts General Laws ch. 221, § 50, which provides in full that:

From the authorized commencement of an action, counterclaim or other proceeding in any court, or appearance in any proceeding before any state or federal department, board or commission, the attorney who appears¹ for a client in such proceeding shall have a lien for his reasonable fees and expenses upon his client's cause of action, counterclaim or claim, upon the judgment, decree or other order in his client's favor entered or made in such proceeding, and upon the proceeds derived therefrom. Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien; provided, that the provisions of this sentence shall not apply to any case where the method of the determination of attorneys' fees is otherwise expressly provided by statute.

Mass. Gen. Laws ch. 221, § 50.

A. Jurisdiction

This Court may properly hear Alpert's claim for a lien by the terms of the statute: "Upon request of the . . . attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien." Mass. Gen. Laws ch. 221, § 50. Other courts have considered a case to be "pending" after the

¹ The word "appears" applies not only to attorneys of record, but also to attorneys who sign pleadings or motions. Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 249 (1993). This is relevant here because Alpert never formally filed an appearance in court.

judgment in the matter was entered. Boswell v. Zephyr Lines, Inc., 414 Mass. 241 (1993) (deciding attorney's lien issues after settlement); Phalon v. Tech. Communications Corp., 1999 WL 1326754, at *5 (Mass. Super. Ct. 1999) (Kottmyer, J.) ("Although the underlying action has been fully adjudicated on the merits, the [c]ourt retains jurisdiction over [a] claim to an attorney's lien."); Salvini v. Flushing Supplies Corp., 137 F.R.D. 190 (D. Mass. 1991) (Ponsor, J.) (deciding attorney's fees under statute after settlement of case); In re Leading Edge Products, Inc., 121 B.R. 128 (Bankr. D. Mass. 1990) (deciding attorney's fees statute after settlement). Similarly, although this Court has already issued a judgment in this matter, the matter may be considered pending before this Court. Moreover, as a state law issue, this Court has supplemental jurisdiction over the matter. In re Hoy's Claim, 93 F. Supp. 265 (D. Mass. 1950).

B. Section 1988

This Court's award under section 1988 does not limit or determine the amount of Alpert's lien. Attorney's fee awards under section 1988 speak to the relation between the plaintiff and defendant and hence section 1988 supplies an award to the plaintiff and not the lawyer. In contrast, the attorney's lien speaks to the relation between the lawyer and his client. The payment that a client owes to his lawyer is not limited by court awarded attorney's fees under section 1988. Venegas v. Mitchell,

495 U.S. 82 (1990). The two are theoretically distinct. Thus, the amount of the lien is not limited by section 1988 attorneys' fees. See Smith v. Consalvo, 37 Mass. App. Ct. 192 (1994).

C. The Amount of the Lien

Whether a lawyer is entitled to a lien depends on whether the lawyer has a valid substantive contract or quantum meruit claim for fees. Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 249 (1993). This is a question of law rather than equity:

We observed in Elbaum v. Sullivan, 344 Mass. 662, 664, 183 N.E.2d 712, that a petition to enforce a lien under [Mass. Gen. Laws ch. 221, § 50] is analogous to a bill to reach and apply under G.L. c. 214, s 3(7), in that there is first, a law aspect to the proceeding (the establishment of an indebtedness from the defendant to the plaintiff) and second, an equity aspect (the process of collecting the debt, if established, out of property rights which cannot be reached on an execution). The respondent is entitled to trial by jury respecting the alleged debt. He is not entitled to trial by jury on the remedial aspect of the case which is purely equitable in nature.

Torphy v. Reder, 357 Mass. 153 (1970). Thus, this Court must determine if Alpert has a valid claim for fees. While it is true that when a lawyer is discharged from working on a contingency fee, the appropriate analysis is one of quantum meruit (supplying the lawyer a reasonable fee), Salem Realty Co. v. Matera, 10 Mass. App. Ct. 571 (1980) (Kass, J.); Malonis v. Browning-Ferris Indus., Inc., 2001 Mass. App. Div. 149 (2001), it appears that this Court is not the appropriate arbiter of the underlying question of the amount of fees owed to Alpert.

The contract between Alpert and Wilson provides that "[a]ny disputes with regard to this agreement shall be resolved by binding arbitration pursuant to the arbitration procedure of the Mass Bar Association fee arbitration board." Alpert's Opp'n Ex. 1 ¶ 9. "Whether a particular agreement calls for arbitration is to be determined by applying general principles of contract law." Mugnano-Bornstein v. Crowell, 42 Mass. App. Ct. 347, 350 (1997); Mirra Co. v. Sch. Admin. Dist., 251 F.3d 301 (1st Cir. 2001) (look to state law contract principles to determine if arbitration is required). A party is only required to submit to arbitration to which she has agreed to submit. Mugnano-Bornstein, 42 Mass. App. Ct. at 350. Under these standards, it appears that Alpert's contract unambiguously indicates that disputes as to the fee should be resolved by the fee arbitration board. Such an arbitration clause is enforceable under both Massachusetts and federal law.² Mass. Gen. Laws ch. 251, § 1;³ 9

² The Court does not resolve which of these statutes applies in this instance because it appears on the surface that the arbitration clause is enforceable under both. It is questionable whether the federal version applies because it is questionable whether the contract involved interstate commerce. Regardless, the Court has before it no arguments attacking the underlying validity of the arbitration clause under either statute.

³ Massachusetts General Laws ch. 251, § 1 provides that "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. The provisions of this chapter shall not apply to

U.S.C. § 2.⁴ Therefore, the dispute as to the amount to which Alpert is entitled should be resolved by the fee arbitration board. See McCue v. Starrett, 10 Mass. L. Rptr. 694 (Mass. Super. Ct. 1999) (Volterra, J.) (enforcing arbitration clause in contract for attorney's fees).

As to the specific amount of the lien in this Court, this amount is unknown until conclusion of the arbitration. It appears that the "assertion of a specific amount for the lien is not necessary, and in many cases impossible.⁵ That [a particular amount is claimed] is immaterial. Filing an attorney's lien for a specific amount does not entitle an attorney to fees in that amount, nor does it limit the court in its determination of reasonable fees for the services rendered." Cohen v. Lindsey, 38 Mass. App. Ct. 1, 6 & n.9 (1995). This Court cannot play its role until the underlying amount of the lien is established

collective bargaining agreements to arbitrate, which are subject to the provisions of chapter one hundred and fifty C, except as provided by the provisions of chapter one hundred and fifty-two."

⁴ 9 U.S.C. § 2 provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

⁵ For example, in contingent fee cases, or cases where the lien is filed while litigation is still ongoing.

through arbitration.

D. Possible Rebuttals

It might be argued that because the parties ultimately settled, the lien statute does not apply. This argument must be rejected. Although it does not appear entirely clear under state law whether the lien statute applies to settlement awards, compare Salvani v. Flushing Supplies Corp., 137 F.R.D. 190 (D. Mass. 1991) (Ponsor, J.) (assuming without deciding that statute applied to settlement proceeds); In re Hoy's Claim, 93 F. Supp. 265 (D. Mass. 1950) (applying statute where client entered into secret settlement agreement with other party); with In re Leading Edge Products, Inc., 121 B.R. 128 (Bankr. D. Mass. 1990) (not applying it to settlement where there were no actual settlement proceeds); see also Phalon v. Tech. Communications Corp., 1999 WL 1326754, at * 3 n.14 (Mass. Super. Ct. 1999) (comparing case law), this question does not appear relevant to this case because there was a judgment in McClure's favor. The lien attached to that judgment upon issuance of the judgment. When an attorney files an action, an inchoate lien arises in his or her favor. The lien becomes choate when a judgment, decree or other order is entered in the client's favor. The subsequent settlement of the case does not undermine the already attached lien on the judgment. Craft v. Kane, 51 Mass. App. Ct. 648, 651-52 (2001) (holding that because the lawyer's lien arose on the commencement

of the client's suit, his notice of lien was first in time when filed, and remained unaffected by the later settlement and dismissal of suit). To allow a post-judgment settlement to wipe out the attorney's lien would defeat the purpose of the lien statute of protecting lawyers' fees. Id.

Second, it may be argued that Alpert is not entitled to the benefit of the lien statute because he voluntarily withdrew. "Whether withdrawal works a waiver of the attorney's lien depends on whether the attorney had good cause to withdraw. Thus if, for example, withdrawal occurs because of a breakdown in the lawyer-client relationship, illness of the lawyer, or development of an unforeseen, and reasonably not foreseeable, conflict of interest the attorney's lien remains intact." Phelps Steel, Inc. v. VonDeak, 24 Mass. App. Ct. 592 (1987); Eliot v. Lawton, 89 Mass. 274 (1863) (holding that lawyer client relationship may be terminated for "a good and sufficient cause [e.g., failure to supply reasonable funds], and upon reasonable notice"). This argument has some bite. It appears that this question is governed by the contract, however, and any dispute as to the contract must be decided via arbitration. Thus, it is not the role of this Court to make this determination.

II. Conclusion

For these reasons, this Court referred the matter to the Massachusetts Bar Association fee arbitration board. After there

is a determination of fees via arbitration, this Court may exercise its power to enforce the lien in the determined amount.

WILLIAM G. YOUNG
CHIEF JUDGE